

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
: 20-CV-01502 (BMC)
: 20-CV-01824 (BMC)
IN RE: XP INC SECURITIES :
LITIGATION, : United States Courthouse
: Brooklyn, New York
:
: Thursday, August 20, 2020
: 11:00 a.m.
:
- - - - - X

TRANSCRIPT OF:
CIVIL CAUSE FOR PRE-MOTION CONFERENCE VIA TELEPHONE
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: THE ROSEN LAW FIRM, P.A.
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Martin Emiliano BY: ANTONIO JORGE PEREZ-MARQUES, ESQ.
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BY: KINGDAR PRUSSIEN, ESQ.

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1 (Teleconference call initiated.)

2 (Judge BRIAN M. COGAN is on the call.)

3 THE COURT: Good morning, this is Judge Cogan.

4 We have the unfortunate byproduct of AT&T, and I
5 have had this before, that there is some clicking on the line.
6 Let's see if we can work through it. Hopefully, it will go
7 away. If not, we are going to have to replace the call.

8 The case is In Re: XP Securities Litigation
9 20-CV-1502 and 20-CV-1824. This is a pre-motion conference on
10 the defendant's proposed motion to dismiss.

11 Let me know who is here and please, just give me the
12 people who are going to be speaking on behalf of the
13 plaintiff.

14 MR. GOLDBERG: Good morning, Your Honor.

15 From the Rosen Law Firm, Jacob Goldberg on behalf of
16 plaintiffs Swayam and Usha Prakash, and 4Fs Family, Inc.

17 With me is my colleague Leah Heifetz-Li and my
18 colleagues from the Bernstein Liebhard firm, Laurence Hasson
19 and Matthew Guarnero.

20 THE COURT: You have given me four people. Are they
21 all going to the speaking?

22 MR. GOLDBERG: No, Your Honor, only I, Jacob
23 Goldberg. That's why I introduced my colleagues.

24 THE COURT: Okay.

25 Who is here for the company?

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1 MR. PEREZ-MARQUEZ: Good morning, Your Honor.

2 This is Antonio Perez-Marquez from Davis Polk for
3 FCA XP Investments U.S. LLC and Messrs. Lifchitz and Wilson.

4 I also have a couple colleagues on the line, but I
5 will be doing the speaking.

6 THE COURT: Okay.

7 Who is here for the underwriters?

8 MR. PRUSSIEN: Good morning, Your Honor.

9 This is Kingdar Prussien from Milbank LLC
10 representing the underwriters.

11 THE COURT: All right. The way I run these
12 pre-motion conferences is generally, I see if there is any way
13 that we can simplify the motion. I think this is not a case
14 where I am going to be able to talk the defendants out of
15 making it or talk the plaintiffs into withdrawing their
16 complaint, so I am not going to try for that, but I will see
17 if there is anything I can do to streamline the issues a bit.

18 Please note, though, that while I am going to
19 express to you some preliminary opinion on how I think the
20 motion may come out, I have not made up my mind on anything.
21 It happens all the time that, when I get the actual motion
22 papers, I come around 180 degrees from where I was at the
23 pre-motion conference. So, no one be disturbed if I sound
24 like I have already made up my mind because I assure you, I
25 have not made up my mind on anything. I am just probing to

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1 see where we can get to on the motion.

2 Having said that, I have a few questions for the
3 plaintiff. I do want to remind everyone, I guess we have got
4 three speakers on the phone; please, state your name before
5 you start speaking so that the court reporter knows who is
6 talking.

7 The first thing I wanted to ask the plaintiff is,
8 the undisclosed civil cases that you are complaining about, if
9 I am reading the consolidated amended complaint right, you are
10 talking about 12 million to each and that, in my calculation,
11 comes to about two-and-a-half, two-and-three-quarter million
12 dollars?

13 Is that a material omission?

14 MR. GOLDBERG: Your Honor, this is Jacob Goldberg on
15 behalf of the plaintiff.

16 Your Honor, the materiality of these undisclosed
17 cases and the increase from 69 million to 81 million *real*, the
18 materiality is self-explanatory because the registration
19 statement itself conveys the information, which means that the
20 registration conveys to investors that the number of civil
21 actions in which the company is engaged is material.

22 Within the context of that, Your Honor, the increase
23 the increase in *real* is material being 12 million of the --
24 instead of 69 it's 81, so it's 12 million -- even though it
25 may not be material to the net income of XP.

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1 However, Your Honor, as this Court knows, the
2 Second Circuit has said over and over again the SEC clarified in
3 1999 through SAB -- Sam-alpha-bravo -- 99 that materiality is
4 both qualitative and quantitative. If this company is
5 experiencing not 178 pieces of litigation but actually 450,
6 and the amount is materially higher, that may caution
7 investors about a risk that is different than the way they
8 understood it.

9 So, even as the Court may be correct in narrow sense
10 that quantitatively 12 million *real* could be immaterial, in
11 the context of what the registration is conveying to
12 investors, both the number of the, and the amount, is material
13 to what the registration statement says, which presupposes the
14 materiality of the information generally.

15 THE COURT: I understand what you are saying and
16 certainly, I agree with you; it is quantity as well as
17 quality, but I am trying to look at this as I do in a
18 practical way from the perspective of an ordinary investor who
19 is looking at this. And if it had been disclosed the way you
20 wanted -- 453 cases instead of 178 cases, giving an additional
21 \$3 million, tops, of exposure -- would it really matter to an
22 investor?

23 MR. PEREZ-MARQUEZ: Well.

24 THE COURT: This is a billion-dollar offering,
25 right?

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1 MR. GOLDBERG: Yes, Your Honor. But, if I may; the
2 entirety of the nine-month net income for this company is 695
3 million *real*. Is 61 million versus 80 -- 69 million versus 81
4 million *real* material?

5 I think the problem with the Court's focus on
6 quantity is, no investor needs have changed their view of
7 investing in the company at a particular price. That's not
8 the materiality standard. You know, as the Court in the
9 Litwin versus Blackstone Group case 634 F.3d 706 stated about
10 materiality, it's not necessary to assert that the investor
11 would have acted differently if an accurate disclosure was
12 made.

13 So, Your Honor, I cannot tell you at this stage that
14 an investor would have changed her opinion and her investment
15 choice based on this information. Rather, materiality, as the
16 Court notes, is inherently fact-finding. What defendants are
17 asking you to do, they are not challenging the allegations of
18 the complaint; that there were materially more proceedings
19 than they listed in the registration statement. They are not
20 claiming that it was only 69 and not 81 Brazilian *real*. That
21 is not the issue.

22 What they are saying to you, as the Court has
23 discussed in Litwin is, is this immaterial as a matter of law.
24 And I think that you know, again, the Second Circuit in Litwin
25 reversing the District Court dismissal said when the District

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1 Court is presented with a 12(b)(6) motion, a complaint may not
2 be properly dismissed on the ground that the alleged
3 misrepresentation or omission are not material unless they are
4 so obviously --

5 THE COURT REPORTER: Counsel, I am sorry, I am
6 losing you with the clicking.

7 MR. GOLDBERG: Let me go back, this is Jacob
8 Goldberg.

9 THE COURT: Just your last sentence, Mr. Goldberg.

10 MR. GOLDBERG: You've got it. I will go halfway
11 through the quotation.

12 The Court says complaints, this expert says: A
13 complaint may not properly be dismissed on the ground that the
14 alleged misstatements or omissions are not material unless
15 they are so obviously unimportant to a reasonable investor
16 that reasonable minds could not differ on the question of
17 their importance.

18 Your Honor, given that some of these are customer
19 complaints, some may be larger, some may be smaller, you know,
20 the lifeblood of this company is its customers. Another part
21 of the lifeblood of this company is its independent financial
22 analysts -- advisors, I beg your pardon -- IFAs. And because
23 of that, Your Honor, these reassert that one cannot say that a
24 failure to disclose accurately and materially accurately the
25 number of proceedings and the amount of prospective liability

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1 is immaterial as a matter of law at the pleading stage.

2 Defendants, they tried to show that at summary
3 judgment or to convince the finder of fact, ultimately, that
4 it is immaterial, but at the pleading stage, we believe it's
5 incorrect to all these disclosures about proceedings and
6 amounts immaterial as a matter of law.

7 THE COURT: Everyone on the line can hear me?

8 MR. GOLDBERG: Your Honor, this is Jacob Goldberg I
9 didn't catch your last comment, I am sorry.

10 THE COURT: Okay, I can barely hear you now,
11 Mr. Goldberg. Everybody, hang on a second.

12 Vicky, could you hear them okay?

13 THE COURT REPORTER: It was a little difficult,
14 Your Honor, but I am getting it. Thank you.

15 THE COURT: All right, that is fine.

16 What happened was my speakerphone cut out for some
17 reason, it did not drop the call it just cut off the speaker,
18 so I heard nothing for about the last 30 seconds, but that is
19 okay Mr. Goldberg because I am going to get the transcript and
20 I will hear your last 30 seconds.

21 Let me ask you one thing. Isn't it also a factor
22 that we are not talking about a cost item here, an actual
23 out-of-pocket nondisclosure expense. We are talking about
24 loss, which anybody can file, and have not been determined,
25 and you are talking about an increased exposure, I assume,

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1 based on the amount in the lawsuit which is not always a good
2 indication of the value of the lawsuit, as you well know.

3 So, does that not also decrease the likelihood of
4 materiality?

5 MR. GOLDBERG: Your Honor, again, focusing on
6 quantity and not on quality --

7 THE COURT: We are focusing on quality. I am
8 focusing on quality. I am saying the quality of an
9 undisclosed lawsuit is different than the quality of an
10 undisclosed out-of-pocket expense. Isn't that?

11 MR. GOLDBERG: Again, Jacob Goldberg.

12 The answer to your question, Your Honor, is: Not
13 necessarily.

14 So, for example, begging the Court's pardon, I don't
15 know what the legal system is in Brazil for handling, for
16 example, a customer complaint or a labor complaint. So, as
17 the Court knows, and as defendants would recognize, in this
18 country, a financial representative or a brokerage firm that
19 comes into conflict with one of its clients may find itself
20 before a FINRA arbitration and not in court.

21 And so, the question here, Your Honor, is yes, let's
22 assume it is so; that anyone can file litigation. This
23 litigation against the company from customers or with respect
24 to labor or hypothetically from IFAs -- from independent
25 financial advisors -- if that litigation is increasing

1 materially, that may prompt an investor to understand in the
2 context of the risk warning about this is a customer-based
3 business, ours, XP's is the Schwab model; get the money in the
4 door.

5 If customers are dissatisfied with this product, the
6 amount of litigation qualitatively may show a weakness that
7 the number itself, the quantity, may not.

8 THE COURT: Okay. That makes sense to me. I can
9 understand that.

10 Is there any suggestion in the complaint as to what
11 the percentage of disaffected customers or IFAs was that this
12 increase represented? For example, if what was disclosed was
13 that .5 percent of customers are disaffected and the
14 nondisclosure made it 1.5 percent, then that still, to me,
15 seems more like a quality thing than a quantity thing. I
16 mean, maybe it is quantity, but it still does not seem to
17 matter all that much.

18 MR. GOLDBERG: Jacob Goldberg again, Your Honor.

19 Respectfully, if what the Court is saying is that a
20 reasonable investor would not care about a material increase
21 in the number of lawsuits in the context of the entire
22 registration statement about this company's operations, but
23 also in context of the actual disclosure which told investors
24 a number specific -- this isn't an opinion, there is no
25 judgment here, this is we XP face this many claims and the

1 impact we predict is X -- and because of that, Your Honor, it
2 is difficult to say at this stage, it is difficult to say that
3 a reasonable investor would not find that material
4 difference -- and the difference as viewed in the context of
5 the actual disclosure is material -- it's difficult to say
6 that a reasonable investor would not find it important and
7 adding to the total mix of information.

8 THE COURT: Okay.

9 All right. Does the company have anything that it
10 wants to add on this point?

11 MR. PEREZ-MARQUEZ: This is Antonio Perez-Marquez,
12 Your Honor.

13 Just briefly, I would just like to address that
14 obviously, the dismissal based on lack of materiality, even at
15 the pleading stage, is well-accepted in the Second Circuit and
16 I would point the Court to the decisions of the Second Circuit
17 in the case of ECA versus JP Morgan, which is 553 F.3d 187 and
18 the decision of the Second Circuit in Hutchison versus
19 Deutsche Bank, 647 F.3d 479.

20 THE COURT: I think that is common ground between
21 all of us, but I think what the plaintiff is saying is that I
22 cannot reach a determination of materiality based solely on
23 the language of the complaint.

24 MR. PEREZ-MARQUEZ: Yes, Your Honor, if I may. This
25 is Antonio Perez-Marquez again.

1 I believe with this complaint you can for two
2 reasons. One is, the quantitative materiality is so far below
3 any applicable threshold. As the Court focused on in its
4 first question, we are talking about a total alleged
5 undisclosed potential exposure of \$3 million with a company
6 that has assets of 9.4 billion. It is really a de minimus
7 quantitative amount.

8 As to qualitative materiality, they really haven't
9 said anything at all. In the complaint they don't even allege
10 what the nature of these civil proceedings are, who the
11 alleged claimants are or what the suits concern. They have
12 alleged nothing that would give a basis for the Court to
13 conclude that the suits are quantitatively -- I'm sorry --
14 qualitatively material either. So, there actually are, even
15 on the face of the complaint, no basis for a finding that this
16 was a material omission.

17 And that is in the context of what are also robust
18 disclosures as to the fact that the company does face legal
19 proceedings, that it is part of legal and regular tort
20 proceedings and that those can be material; the fact that the
21 company disclosed the costs of any resolutions prior to the
22 IPO; the fact that the company disclosed reserves for
23 proceedings that had a probable risk of loss and an estimate
24 for possible losses in pending actions.

25 THE COURT: You are right, there are a lot of

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1 disclosures, but this case really is not about what was
2 properly disclosed; it is whether there were material
3 nondisclosures. So I do not think it helps to say well, we
4 were really good on everything else even if we were a little
5 deficient here. I think what you are saying is, even if we
6 were deficient here, we were deficient in such a small way, it
7 wouldn't affect an investor. And I understand that.

8 Let me turn back that Mr. Goldberg for a second
9 because a want to ask him: Is there any description in the
10 complaint, and I will admit to not having memorized it, that
11 the nature of these particular undisclosed lawsuits from a
12 quality perspective rather than a quantity perspective,
13 actually bore on the materiality?

14 In other words, there are certain kinds of lawsuits
15 that just do not matter because they are normal course of
16 business, but what you are suggesting to me in your remarks
17 before is that these particular plaintiffs kind of raised the
18 red flag or who have raised a red flag to an investor. And I
19 would like to know, is there anything in the complaint that
20 describes the nature of the lawsuits as affecting the quality
21 of the nondisclosure.

22 MR. GOLDBERG: Your Honor, if I may point the Court
23 to paragraph 1 -- I'm sorry, this is Jacob Goldberg.

24 THE COURT: Yes.

25 MR. GOLDBERG: To paragraph 135. And that paragraph

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1 lists a chart summarizing possible claims by nature, detailing
2 the amount of these claims or the potential amount of possible
3 exposure.

4 I refer the Court to footnote 2 regarding civil.

5 THE COURT: Yes.

6 MR. GOLDBERG: And it reads: The group is defendant
7 in 178 civil claims by customers and investment agents mainly
8 related to portfolio management, risk rating, copyright and
9 contract termination.

10 Right there, Your Honor, those claims are the 178
11 that were actually upwards of 450 at the time of the IPO and
12 account for a majority, if not all, of the additional possible
13 exposure of 12 million *real*.

14 So, Your Honor, if I, as an investor, am reading
15 that, am I concerned that there are 154 percent greater number
16 of civil complaints by customers and IFAs, the company's
17 lifeblood? I don't think that at the pleading stage, even as
18 a finder of fact, you will ultimately determine that no
19 reasonable investor would consider that as altering the total
20 mix of information. I don't think that -- I beg your pardon,
21 Your Honor, you know that I am telling you what I think -- as
22 a matter of law, it is not immaterial at the pleading stage.

23 THE COURT: Okay. I get your point.

24 I guess the only thing is, the plaintiff not telling
25 me -- if it is asking me to draw the inference, which maybe I

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1 will -- that the nature of the additional undisclosed
2 complaints was the same type as those that were disclosed, and
3 the further inference that these are big deals when litigation
4 comes from these particular sources. You are asking me to do
5 two of those and the only thing I am posing to you is, as to
6 the undisclosed complaints -- not the ones that are disclosed,
7 the undisclosed complaints -- I take it there is nothing else
8 in here that directly pleads what the source of those
9 additional complaints are.

10 MR. GOLDBERG: Your Honor, Jacob Goldberg again.

11 I refer the Court to paragraph 137.

12 THE COURT: Okay.

13 MR. GOLDBERG: In which it says that: XPI was
14 subject to 450, quote, civil proceedings, end quote, as of
15 December 31st, 2019.

16 Your Honor, that reference to civil proceedings,
17 when viewed in context of the cart, the complaint includes at
18 paragraph 135, which lists possible claims as tax, civil and
19 labor, indicates that the civil proceedings in paragraph 137
20 are in addition to the civil proceedings that the complaint
21 describes in paragraph 135.

22 And I will say this, Your Honor. It interested me
23 in reading the defendant's pre-motion letter in which they
24 cite several cases under The Exchange Act with a heightened
25 pleading standard both under Federal Rule of Civil Procedure

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1 9(b) and under the PSLRA. Absent any description of how this
2 Court should evaluate this complaint, Your Honor, we expressly
3 pleaded in the complaint, our clients pleaded strict liability
4 and negligence and therefore, the Court will review, will
5 evaluate the sufficiency of this pleading under Rule 8(a);
6 meaning, it will accept all of the allegations as true, draw
7 all inferences -- all inferences -- reasonable inferences, I
8 beg your pardon -- in favor of plaintiff. And the touchstone
9 here is the plausibility of relief. Is it plausible, based on
10 this complaint, that those 453 civil proceedings are related
11 to the civil proceedings in paragraph 135? It is implausible,
12 we submit, Your Honor, to find differently.

13 THE COURT: Right.

14 MR. GOLDBERG: Is it plausible that the increase in
15 customer and investment agent complaints is material? It is
16 plausible, Your Honor.

17 THE COURT: I understand. Okay.

18 I have not heard from the underwriters. Is there
19 anything nonrepetitive that needs to be added on this point?

20 MR. PRUSSEN: This is Kingdar Prussen, Your Honor.
21 Nothing on this point.

22 THE COURT: Okay.

23 Let me move on then because I think I understand the
24 lay of the land on this.

25 One other question that I will put to you,

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1 Mr. Goldberg. The undisclosed investigation for the IPO did
2 not lead to anything. How is that going to be material since
3 they were never charged?

4 The mere fact of an investigation is something that
5 would affect an investor's decision to invest?

6 MR. GOLDBERG: Yes, Your Honor.

7 If, as the Court should find -- I beg your pardon --
8 if as the Court should find defendant had a duty to
9 disclose -- I am hearing a lot of clicking, Your Honor. Can
10 you hear me?

11 THE COURT: It is bad. It is bad. If you can speak
12 up a little to get louder than the clicking, it would help the
13 reporter, I am sure.

14 THE COURT REPORTER: Thank you.

15 MR. GOLDBERG: I will do my best.

16 Your Honor, first, Jacob Goldberg.

17 As the Court knows, we view the Securities Laws
18 ex-ante and not ex-post. When the defendants state that this
19 was the greatest offering since brown bread and the stock was
20 trading at 47, that is completely irrelevant to the fact that
21 this fell \$10 below the offer price, the IPO price, in March.

22 Your Honor, uncharged wrongdoing -- I am citing to
23 Virtus Investment Partners -- uncharged wrongdoing is
24 typically not subject to a duty to disclosure unless the
25 corporation puts the reasons for its success at issue, when a

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1 defendant makes a statement that can be understood by a
2 reasonable investor to deny that the illegal conduct is
3 occurring or when a defendant states an opinion that absent
4 disclosure misleads investors.

5 The company did put at issue in many places -- in
6 material places in the registration, the company put at issue
7 its success and it tied that success in material part to
8 independent financial advisors, IFAs. So, for example,
9 Your Honor, at point 4 of the registration statement -- I'm
10 sorry, Your Honor.

11 THE COURT: Yes, let's wait 30 seconds to see if it
12 lets up, but I do not think we can hear you through this type
13 of clicking.

14 (Pause in the proceedings.)

15 THE COURT: It is a little better Mr. Goldberg, why
16 don't you try it now.

17 MR. GOLDBERG: Sure. So, Your Honor, again Jacob
18 Goldberg.

19 At page 24 of the registration statement, Exhibit A
20 to defendant's letter it says: There's a risk of increasing
21 payments to IFAs because of competition.

22 On page 82 they tied gross margin contractions to
23 payments to IFAs.

24 On page 94 they tied payments to IFAs.

25 THE COURT: Let me stop you because I accept this as

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1 a basic assumption; that the IFAs are very important to this
2 company and a problem with IFAs is a big problem for the
3 company. Let's start there.

4 If we start there, the fact that the Brazilian
5 authorities were looking into that and found nothing, you
6 know, you cannot make a problem when one is not there. Just
7 because it is important does not mean it is a problem merely
8 because there was an investigation, right? Investigation can
9 come from anywhere and it was found unsubstantiated.

10 MR. GOLDBERG: Again, Your Honor, Jacob Goldberg.

11 Let me take you back to defendant's statements that
12 this stock was a robust success trading at \$47 in August of
13 2020. This offering was floated at \$27 a share. Investors
14 did not invest in this in December to just put \$27 into the
15 company and get \$27 out. They assessed risk, Your Honor.
16 That's why we must look at this ex-ante. The question is what
17 ultimately happened, Your Honor. It is very clear that --

18 THE COURT REPORTER: Counsel, I am sorry, I lost the
19 last sentence because of the clicking.

20 THE COURT: Yes.

21 MR. GOLDBERG: Jacob Goldberg again. Please
22 interrupt me if you can't hear, I will try to speak more
23 loudly.

24 THE COURT: Mr. Goldberg, I think I am going to call
25 the game because of rain. We have tried to work through it

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1 and it is just not getting better, it is getting worse. I
2 hate to do this, but I will direct everyone to hang up and
3 call back and let's see if we get a better connection then.

4 I really appreciate everyone trying to work through
5 this, but the court reporter cannot hear us and I am having
6 some difficulty that I think we have to try again.

7 So let's immediately hang up and re-put the call.
8 We will reconvene as soon as everyone is back on the line.
9 Sorry for the inconvenience, be with you shortly.

10 (Teleconference ended / teleconference restarted.)

11 THE COURT: No, that is not better.

12 MR. GOLDBERG: Your Honor, this is Jacob Goldberg.

13 THE COURT: Yes.

14 MR. GOLDBERG: When the call rang me in, there was
15 no static until about five, so I don't know whose phone it is,
16 and I hate to do this to my colleagues, but it is possible,
17 perhaps we should hang up and only those speaking should dial
18 in.

19 THE COURT: I believe if I hang up, you are put into
20 a waiting room, but I am willing to try. I am going to hang
21 up and you will let me know when I come back if, in fact, I
22 was the problem. Let's find out. Here I go.

23 (Judge Cogan exits and then rejoins the call.)

24 THE COURT: I am back. Is it me?

25 MR. GOLDBERG: No, I don't think it's you.

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1 THE COURT: Okay.

2 MR. PEREZ-MARQUEZ: Your Honor, this is Antonio
3 Perez-Marquez.

4 Just briefly, if it would be helpful to the Court, I
5 would be happy to provide an alternative conference line.

6 THE COURT: What if we try it and it is the same? I
7 am not sure I could emotionally endure that.

8 All right, let's do it. Hang on, let me get a pen
9 instead of a computer. Let's have the number.

10 MR. PEREZ-MARQUEZ: Great.

11 The number will be: 1-(877)-450-5999, and the code
12 will be 431-471.

13 THE COURT: You will serve as the host of the call,
14 right?

15 MR. PEREZ-MARQUEZ: Yes.

16 THE COURT: Okay, let's everyone try that. I will
17 talk to you in a minute.

18 MR. PEREZ-MARQUEZ: Okay, thank you.

19 (Teleconference ended / teleconference restarted.)

20 THE COURT: All right, this is Judge Cogan, I have
21 rejoined. Anyone who is not on the phone, go ahead and tell
22 me. That is a joke.

23 The clicking is gone. All I can say is thanks to
24 Davis Polk for their much improved conference system, and
25 let's continue if you can recall where you were, Mr. Goldberg.

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1 MR. GOLDBERG: I can, Your Honor.

2 May I ask, just to ensure, is the court reporter on
3 the line?

4 Again, Jacob Goldberg, Your Honor.

5 Where I was, we were talking about the investigation
6 of uncharged wrongdoing and I urge the Court to compare the
7 Virtus Investment Partners case with the Lions Gate case that
8 defendants cite. And in both cases they are speaking about a
9 Government investigation involving uncharged wrongdoing and
10 when duty requires disclosure of that uncharged wrongdoing.

11 And, Your Honor, the defendants state a principle
12 that is not incorrect. XP is not required to accuse itself of
13 wrongdoing, certainly not. But what both cases say is that
14 there is no general duty to disclose a Government
15 investigation -- and I am quoting now, Your Honor -- without
16 more. That appears in both cases.

17 The Virtus Investment Partners case expands on the
18 three circumstances in which a company must disclose uncharged
19 wrongdoing and the first of those is when it puts its success
20 at issue but fails to disclose a material source or problem
21 with its success through an improper or, potentially -- it
22 must be an alleged improper or an illegal business practice.
23 In other words, Your Honor, a duty to disclose arises when the
24 investigation XP fails to disclose is materially related to
25 the reasons for its success.

1 And as the Court noted before we left the AT&T call,
2 there is no question that IFAs are integral to this company's
3 business and therefore, because its success depends in
4 material part on IFAs, it can be required to disclose the
5 uncharged wrongdoing. And again, Your Honor, not to put too
6 fine of a point on it, but the ultimate outcome of that
7 investigation, which post-dates the IPO, has nothing to do
8 with the duty to disclose the uncharged wrongdoing ex-ante at
9 the time of the IPO.

10 THE COURT: But Mr. Goldberg, let me ask you this.
11 How often is a national regulatory agency going to initiate an
12 investigation that, if it found some violation, it would not
13 go to the heart of the company's success? I am not saying it
14 never happens, but it seems to me that once you get the agency
15 involved, of course they are looking at something that would
16 be very significant to the company. If it's a minor detail,
17 it is not worth their involvement.

18 MR. GOLDBERG: Your Honor, let's talk about
19 materiality. Again, this is Jacob Goldberg.

20 THE COURT: All right.

21 MR. GOLDBERG: I'm not sure that every SEC
22 investigation that every FINRA investigation, every
23 nongovernmental regulatory investigation is material to a
24 company's success, is material even to its financial result.

25 So, for example, Your Honor, if there is a Foreign

1 Corrupt Practices violation or an alleged Foreign Corrupt
2 Practices Act violation, in Wal-Mart's Mexican operations,
3 that may be immaterial to Wal-Mart. The SEC may be
4 investigating.

5 If Wal-Mart has not put at issue the success of its
6 Mexican operations as being material to the success of the
7 consolidated entity, then that SEC investigation is merely
8 part of ongoing regulatory investigation. And I believe there
9 was some problems with Wal-Mart's Mexican operations recently,
10 Your Honor, but that is a circumstance in which Wal-Mart would
11 not have to disclose the uncharged wrongdoing because it had
12 not created a tether between the Mexican operation and the
13 consolidated result.

14 THE COURT: Okay.

15 MR. GOLDBERG: In this case, however, Your Honor, XP
16 did.

17 THE COURT: I understand. I understand exactly what
18 you are saying.

19 All right. Is there any response from the company?

20 MR. PEREZ-MARQUEZ: Yes, Your Honor, this is Antonio
21 Perez-Marquez from David Polk.

22 Just briefly, I think there is a very important
23 point that plaintiffs are overlooking here, which is that this
24 argument pertains to the alleged failure to disclose uncharged
25 wrongdoing. And as the Court has noted, what they are

1 actually making allegations about are allegations by a
2 competitor that were under investigation.

3 And I would point the Court to the case of Menaldi
4 versus Och-Ziff Capital Management at 164 F.Supp 3d 568 which
5 explains that when a securities fraud action rests on the
6 failure to disclose uncharged illegal conduct, the complaint
7 must state a plausible claim that the underlying conduct
8 occurred.

9 Here, there are no such allegations. The only
10 allegations are that these accusations have been presented,
11 that the accusations were under investigation. And it is the
12 alleged failure to disclose the accusations they are claiming
13 a material omission. That does not suffice. There is, as I
14 believe plaintiffs acknowledge, no freestanding obligation to
15 disclose uncharged, unadjudicated misconduct for a company to
16 accuse themselves of wrongdoing or to speculate about
17 potential adverse results of pending investigations. That is
18 why a Government investigation without more does not trigger a
19 generalized duty to disclose.

20 Now, as to the idea that this becomes material
21 because the IFA network is material, that does not hold water
22 either. The fact that the IFA network is itself important
23 does not mean that any accusation about the IFAs becomes
24 itself material.

25 And by analogy there is a similar observation made

1 of the Second Circuit's decision of ECA versus JP Morgan where
2 they noted that in that case plaintiffs conflated the
3 importance of a bank's reputation for integrity with the
4 materiality of a blank statement regarding its reputation.
5 Here, too, the two things are separate. Yes, the IFA network
6 may be quite important, but that does not mean that any
7 accusation about the IFA network is itself material.

8 The case that plaintiffs rely on as well, their lead
9 case Virtus is also quite, quite different. In that case the
10 issuer's portfolio manager had admitted to willfully violating
11 securities laws. It wasn't a question of accusation, much
12 less accusations like these that have now been rejected. And
13 even in that case, the Court held that the connection between
14 that conduct and the challenged statements was too tenuous
15 other than with respect to a specific statement concerning
16 that portfolio manager's performance.

17 And I would note also that here, again, any positive
18 statement about the IFA network were also coupled with
19 disclosures about the fact that XP was subject to competition
20 law and was subject to an agreement with CADE and that it
21 could be accused by its competitors of anti-competitive
22 conduct as well as other disclosures about risks to the IFA
23 network. So it is not an unvarnished, positive story as
24 presented by plaintiffs. Nothing more beyond these
25 disclosures is required by the securities law.

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1 THE COURT: All right.

2 Is there anything additional from the underwriters?

3 MR. PRUSSIEN: Hi, Your Honor, this is Kindgar
4 Prussien.

5 Nothing additional and nonrepetitive from the
6 underwriters.

7 THE COURT: Okay, thank you.

8 The last point I wanted to cover.

9 MR. GOLDBERG: Your Honor?

10 THE COURT: Yes.

11 MR. GOLDBERG: With apologies this is Jacob
12 Goldberg.

13 THE COURT: Yes, Mr. Goldberg.

14 MR. GOLDBERG: Very briefly.

15 The MenaIdi case is a PSLRA Exchange Act 10(b)(5)
16 case under heightened pleading standards.

17 Thank you, Your Honor.

18 THE COURT: Okay. I assure you all I will carefully
19 read the cases.

20 All right. The last one I wanted to move on to, and
21 I will acknowledge to the defendants that I am kind of leaning
22 towards plaintiff on this one, is the failure to break out
23 these system failures as separate items and rather just
24 booking them or presenting them as an ordinary cost. It does
25 seem to me that if there is some systemic kind of problem

1 going on, that is something an investor might well want to
2 know. And to camouflage it as treating it like just some of
3 the expenses of doing business, I am not sure that is a full
4 enough disclosure.

5 So, let me start with the company on that one.

6 MR. PEREZ-MARQUEZ: Yes, Your Honor, I'm happy to
7 address that. This is Antonio Perez-Marquez.

8 First of all, as the Court noted but it is an
9 important threshold point, there is no dispute that these
10 costs were all disclosed. So, what they are talking about is
11 not something that would affect any bottom line financial
12 metric. It's just a matter of the particular line items in
13 which the relative cost --

14 THE COURT: Again, the quality versus quantity issue.
15 These might be very significant costs, more so than ordinary
16 costs of business.

17 MR. PEREZ-MARQUEZ: Understood, Your Honor, and I
18 will address that point as well.

19 So, but it is important to start by noting that this
20 isn't something is affecting any bottom line financial metric.
21 The issue is whether, as plaintiffs claim, they should have
22 been disclosed in a different line item.

23 Now, plaintiffs' position that the costs should have
24 been consolidated in a single line item is based entirely on
25 the allegation that they were recorded in a single line item

1 by a subsidiary of XP called CCTVM, which is the broker in
2 Brazil.

3 THE COURT: Right.

4 MR. PEREZ-MARQUEZ: And plaintiffs allege that XP
5 should have disclosed those costs the same way that CCTVM did
6 and that it was materially misleading not to do so.

7 But what plaintiffs are overlooking, and this is
8 clear from the complaint and from materials incorporated
9 therein, is that CCTVM is subject to different accounting
10 standards. It is governed by Brazilian central bank
11 principles not by IFRF. So, of course, they're going to be
12 differences in the accounting treatment. And the fact there's
13 such a difference does not reflect any kind of inconsistency.

14 This is one of the main crystal clear errors made in
15 the Winkler report on which plaintiffs base their complaint.
16 They were alleging, quote, unquote, inconsistencies based on
17 what were differences in accounting treatment between entities
18 that were subject to different accounting standards. This was
19 pointed out on the very first page of the 6K that the company
20 filed responding to the Winkler group's allegation. The
21 company noted that the report is full of errors along with
22 points that are immaterial and/or irrelevant. For example,
23 the report demonstrates a lack of knowledge about the
24 different accounting rules -- Brazilian central bank standards
25 versus IFRF -- and uses inappropriate comparison.

1 That's what this is. Their only basis to say these
2 are what are, in effect, disparate expenses actually should
3 have been treated as one uniform category; is that that's how
4 they were treated by a different entity under different
5 accounting standards.

6 THE COURT: Well, I am not sure it is that simple
7 because I think -- tell me if I am wrong -- but I do not think
8 that compliance with the applicable accounting standards is
9 necessarily a defense to a securities fraud case or a
10 registration case. It seems to me that you can comply, but if
11 you technically comply and yet the compliance omits something
12 that would be material to an investor, you still might be
13 exposed.

14 MR. PEREZ-MARQUEZ: Well, that is where we get,
15 Your Honor, to the next flaw in their argument, which is that
16 they don't actually address what these costs were. They talk
17 about operation errors, systems failures. When the Court
18 reads the complaint carefully once again, as we know the Court
19 will, you will see there really isn't any substance here as to
20 what these were. And so, the premise that there was some
21 monolithic category, some trend that was going undisclosed is
22 just not supported by the allegations of the complaint.

23 The other point to raise here is that the CCTVM
24 accounting treatment here, which they point to as effectively
25 the correct non-misleading disclosure of these issues, was

1 itself publicly available on XP's own website and there is no
2 duty to disclose what is publicly available. We would point
3 the Court to the case of In Re: Merrill Lynch at 272 F.Supp
4 2d 243 and there are cases from this district as well such as
5 the Keyspan case that make the same point.

6 So the premise of their position that there was some
7 sort of trend, some sort of pattern of errors that was going
8 undisclosed is not supported by the allegations of the
9 complaint. It boils down to the notion that because of how
10 these costs were treated in the Brazilian entity CCTVM, they
11 should have been treated as a group, a different entity
12 subject to different accounting standards as well.

13 THE COURT: Okay.

14 Mr. Prussien, before I hear from Mr. Goldberg, is
15 there anything you want to add to that?

16 MR. PRUSSIEN: Your Honor, Kingdar Prussien.

17 No, nothing add to that.

18 THE COURT: Okay.

19 Mr. Goldberg, doesn't this get down again to the --
20 well. Let me ask you this before I ask the question I was
21 going to.

22 Do you have any more details that you would like to
23 include by way of an amended complaint?

24 MR. GOLDBERG: Your Honor, if I may.

25 I would like to confer with my co-counsel and my

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1 colleagues about that. So, I would appreciate the opportunity
2 not to say yes or no to that presently.

3 THE COURT: Okay.

4 Frankly, the Second Circuit has made it clear that
5 even if I got you to say no, I could not stop you from doing
6 it later, although I have had a case where I did not stop it
7 from happening but I did make an adjustment in the ultimate
8 award of attorneys' fees based on having taken us through a
9 whole motion to dismiss for no reason only to get an amended
10 complaint. So, I would ask you to carefully consider if
11 before we get the defendant's motion -- and that would have to
12 be pretty soon because the defendant's motion is due in less
13 than a month -- you might have a fuller complaint that you
14 want to present.

15 Go ahead, talk to your colleagues, decide if you
16 want to do that but if you do, please do not make the
17 defendants go to the trouble of drafting one of these six-inch
18 thick motions in a 12(b) context, okay?

19 MR. GOLDBERG: Your Honor, Jacob Goldberg.

20 I acknowledge what the Court said and to my
21 knowledge today we do not, but if we do and my colleagues
22 inform me of that, we will not make defendants and the Court
23 waste time. We commit to that.

24 THE COURT: Okay.

25 MR. GOLDBERG: And we hear the Court's instruction

1 clearly.

2 Your Honor, let me work backward. Again, this is
3 Jacob Goldberg. Let me work backwards.

4 The CCTVM accounting treatment is publicly
5 available. I referred -- the Merrill Lynch case to which my
6 friend refers, if my memory serves me correctly that, too, is
7 a 10b aftermarket case. I refer the Court to Exhibit A to the
8 defendant's pre-motion letter and it's at page 1. Little i,
9 Your Honor, is the page.

10 THE COURT: Yes.

11 MR. GOLDBERG: We the selling shareholders, as the
12 registration conveys, have not authorized anyone to provide
13 any information other than that contained in this prospective.

14 If the Court views that paragraph, what they are
15 saying is that this is self-contained. You, investor, don't
16 have to go and look for the CCTVM stuff and even if you did,
17 you shouldn't rely on that. Rely on this and this only.

18 So then the question becomes what did they actually
19 say about these systems failures and order execution errors.
20 And what the CCTVM information conveys or uncovers or
21 discloses is that there are material costs, upwards of a
22 hundred million *real*, again, against 699 million in net
23 income. There are these costs and they relate to what the
24 Court earlier called a potential systemic problem.

25 The accounting one system versus another is a red

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1 herring. The complaint reads that there are a hundred million
2 of these and that there is no way for an investor to assess
3 this potential systemic problem in view of how defendants
4 disclosed it.

5 Your Honor, I was privileged to argue the Setzer
6 versus Omega case before a panel of the Second Circuit last
7 November and there was very interesting colloquy which isn't
8 reflected in the opinion, but is reflected by the opinion.

9 THE COURT: Did you win?

10 MR. GOLDBERG: We did, Your Honor. The Second
11 Circuit reversed.

12 THE COURT: I just wanted to know.

13 MR. GOLDBERG: Yes, we did, Your Honor, thank you.
14 Again, Jacob Goldberg.

15 In the Setzer case, Your Honor, Judge Leval --
16 effectively, the company lent money to operators and purchased
17 property that operators could operate as skilled nursing
18 facilities. And one of their operators, their second largest
19 operator -- and the company is Reit -- the second largest
20 operator was in financial straights and the company never
21 disclosed it. When they disclosed the financial straight,
22 they said, hey, you know, there's a little bit of a problem
23 but we think everything's great, but they omitted that the
24 only way the company continued to pay rent was through a loan
25 that Omega had made to the operator.

1 The problem, Your Honor, was -- and as Judge in
2 colloquy with Defense Counsel, Judge Leval said, wait a
3 minute, what you did was you transferred an obligation that
4 would have appeared on the income statement to a balance sheet
5 obligation; hiding in a general loan statement that
6 effectively they owed you money. They owed you money either
7 way.

8 Your Honor, as Judge Leval points out the GAAP
9 treatment was not improper. The failure to disclose the loan,
10 however, to inform investors of exactly what was going on was
11 improper, and that's the reason for the reversal.

12 There's another case, Your Honor, the Smith Barney
13 case, which is apposite, although not on all fours, 595 F.3d
14 86 where the Second Circuit lays out what is blackletter law,
15 the veracity of a statement or omission is measured not by its
16 literal truth, but by its ability to accurately inform rather
17 than mislead.

18 My friend is exactly correct, there is no
19 bottom-line impact. But as the Court notes, there may be a
20 systemic one. And in Smith Barney -- and again, Your Honor,
21 we're dealing with materiality here and not duty. So, the
22 duty in Smith Barney was, there was an SEC regulation
23 requiring Smith Barney to disclose certain management fees
24 that they disclosed as other fees. Well, that didn't impact
25 the bottom line at all, but they still weren't permitted, it

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1 was still material, to know the difference between these fees.

2 And that should prompt the Court to deny a motion to
3 dismiss because what the complaint alleges with respect to
4 these expenses is that systems failures and order execution
5 errors are important and material -- I beg your pardon -- and
6 investors had a right to see what was going on there. And
7 their failure to disclose, either through a separate line item
8 or in violation of international financial reporting standard
9 one, to provide some description that enabled investors to
10 understand what those costs were, that they existed and the
11 material amount. That is something that they were duty-bound
12 to disclose and the underlying information is qualitatively
13 material.

14 THE COURT: Okay. I understand what you are saying.

15 It does seem to me, though, that a lot of the
16 substance of the complaint that you just gave me in your last
17 comment is kind of general and does not really tell me; it
18 suggests that there is a systemic problem but it does not
19 really tell me what it is or that it is systemic. The
20 question is, is your claim just possible? It is certainly
21 possible. But is it plausible? I am not sure. That is why I
22 have asked you and you have agreed to think about whether
23 there is any more to it that you want to contribute.

24 But I do want to emphasize the point that I made at
25 the outset, which is; nothing that I say today should be

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1 viewed as indicative of the way I am certainly going to come
2 out. Please, keep that in mind.

3 Okay, there are only a couple of things I want to
4 cover. We have a schedule in place on the assumption that
5 plaintiffs do not file an amended complaint or a second
6 amended complaint and Mr. Goldberg is going to let us know
7 about that shortly.

8 Is everybody okay on the schedule that we are
9 talking about? Does everyone know what I am referring to?

10 MR. GOLDBERG: Jacob Goldberg on behalf of
11 plaintiffs.

12 We are okay with the schedule.

13 THE COURT: Okay.

14 Defendants, too?

15 MR. PEREZ-MARQUEZ: Yes, Your Honor.

16 Antonio Perez-Marquez for the XP defendants.

17 THE COURT: Okay.

18 MR. PRUSSIEN: We are as well.

19 THE COURT: Good.

20 I do not like to get off a call like this if there
21 is anything else that anyone needs to say. I will hear from
22 you, Mr. Goldberg, first, and then I will hear from defendants
23 last because it is their motion.

24 MR. GOLDBERG: Your Honor, I have little to add. I
25 have been unduly prolific during this call.

1 I would ask the Court to re-read the complaint with
2 respect to the Winkler report and the company's reaction to
3 that. From my perspective the complaint pleads more than
4 plausibly that we're not arguing about whether these system
5 failures and order execution error costs are really system
6 errors and order execution costs. We are only talking about
7 how they disclosed or -- I beg your pardon -- how the
8 registration statement disclosed or failed to disclose those
9 costs.

10 But again, Your Honor, with the Court's comments in
11 mind, I will confer with my colleagues and endeavor by a week
12 from tomorrow to alert defendants whether we intend to amend.

13 THE COURT: That would be good.

14 All right, is there anything further from
15 defendants?

16 MR. PEREZ-MARQUEZ: Just two points, Your Honor, if
17 I may. It's Antonio Perez-Marquez for the XP defendants.

18 First, on this issue we were just discussing about
19 the operating costs. I believe that the point that was made
20 by the Court in its most recent questions is exactly right;
21 that this characterization being advanced by plaintiffs that
22 this is a systemic issue is a possibility but not a conclusion
23 that is plausibly supported by any allegations or facts pled
24 in the complaint. Its just not there. It is just an
25 assumption that is being made, not something that has been

1 supported by the pled facts.

2 And so, where we end up is in this situation that is
3 the same as in the case of In Re: China Valve Technologies
4 Securities Litigation at 979 F.Supp 2d 395 in which the Court
5 dismissed securities claim where, quote, plaintiffs failed to
6 allege any plausible basis for believing the discrepancies
7 were due to anything other than different reporting standards.
8 In that case between Chinese and U.S. reporting standards.
9 That is a key point on that set of allegations.

10 The second point that I wanted to raise just briefly
11 is that we haven't touched on the 12(a)(2) claim. And I did
12 want to flag that plaintiffs' response to our pre-motion
13 letter did not address what we had identified as the fatal
14 flaw of that claim, which is that these plaintiffs' own
15 certifications say that they did not purchase from the IPO and
16 12(a)(2) does not apply to aftermarket purchases. So, there
17 is a fatal flaw there that requires dismissal of that claim as
18 well.

19 I believe that Mr. Prussien may have wanted to be
20 heard on that claim as well, but I will defer to him on that.

21 THE COURT: Okay.

22 I did not ask about that only because I think I have
23 got a pretty firm handle on the law and the application of the
24 law to the complaint, but if you want to be heard on standing
25 on the 12(a)(2) Mr. Prussien, I am glad to hear from you.

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1 MR. PRUSSIEN: Thank you, Your Honor. This is
2 Mr. Prussien.

3 I take it from the Judge's statement that Your Honor
4 is familiar with the state of the law here and very familiar
5 with what the Supreme Court has decided and what the
6 Second Circuit has continuously followed. I am okay to rely
7 on what we initially stated in the letter and on the papers to
8 follow.

9 THE COURT: All right.

10 Thank you all for calling in. Special thanks to
11 Davis Polk for their contribution of their tele-con network.
12 I assure everyone that will get them no special consideration
13 whatsoever, but I do appreciate it.

14 All right, we will about in be in touch. Thank you,
15 everyone.

16 ALL: Thank you, Your Honor.

17 (Matter concluded.)

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